Chapter 2

Authority and Restrictions

2.1 Appointed by the Chief Executive of the Hong Kong Special Administrative Region Government, The Ombudsman has statutory authority to operate with independence and without fear or favour. The enabling legislation is The Ombudsman Ordinance (the Ordinance), Cap 397, Laws of Hong Kong.

Powers and Functions

2.2 The function of The Ombudsman is to investigate into maladministration, by the public organisations in Schedule 1 to the Ordinance, through processing complaints or by initiating direct investigation.

Fig. 2.1

Definition of Maladministration – section 2 of the Ordinance

"Maladministration" means inefficient, bad or improper administration and, without derogation from the generality of the foregoing, includes –

(a) unreasonable conduct, including delay, discourtesy and lack of consideration for a person affected by any action;

(b) abuse of any power (including any discretionary power) or authority including any action which –

- (i) is unreasonable, unjust, oppressive or improperly discriminatory or which is in accordance with a practice which is or may be unreasonable, unjust, oppressive or improperly discriminatory;
- (ii) was based wholly or partly on a mistake of law or fact;

(c) unreasonable, unjust, oppressive or improperly discriminatory procedures

Powers of Investigation

2.3 Where a complaint is lodged with The Ombudsman's Office, The Ombudsman may, under section 7 of the Ordinance, conduct an investigation, except where it is outside her jurisdiction or otherwise restricted under the Ordinance (see **paras. 2.13 - 2.15**). This may be by preliminary inquiries or a full investigation. The law requires The Ombudsman to notify the organisation concerned before starting a full investigation.

2.4 Under section 11A of the Ordinance, The Ombudsman may conduct preliminary inquiries into a complaint before deciding whether a full investigation should be conducted. Section 11B empowers The Ombudsman to deal with complaints by mediation with consenting parties. Where preliminary inquiries or mediation point to the need for a full investigation, the parties to the complaint will be so informed. Details of our preliminary inquiry and mediation service are described in **Chapter 4**.

2.5 The Ombudsman determines whether a complaint is subject to her jurisdiction. Where The Ombudsman considers it in the public interest to do so, she may continue with an investigation even if the complainant has withdrawn his or her complaint.

2.6 The Ordinance also empowers The Ombudsman to investigate matters of maladministration even in the absence of a complaint. More details of this aspect of my work are given in **Chapter 3**.

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2.7 As with ombudsman institutions the world over, The Ombudsman has extensive investigative powers. Section 13 of the Ordinance empowers The Ombudsman to summon any person for examination or require such person to furnish information and produce any document or item in his or her possession or under his or her control.

2.8 Section 20 of the Ordinance confers upon The Ombudsman the power to enter any premises of a scheduled organisation, inspect the premises and carry out on the premises any investigation which is within her jurisdiction.

2.9 Under section 23 of the Ordinance, it is an offence to obstruct, without lawful excuse, The Ombudsman or her officers in the exercise of powers conferred by the Ordinance, fail to comply with their lawful requirements, make false statements or otherwise knowingly mislead them. Such offences are liable to a fine of $10,000 and to imprisonment for six months.

Fig. 2.2

Powers of Investigation

- Summoning of witnesses
- Access to documents including classified documents
- Entry into premises
- Penalty for not cooperating in investigation

Investigation Reports

2.10 The Ombudsman must, under section 17 of the Ordinance, inform the complainant of the result of her investigation.

2.11 The Ombudsman is empowered under section 16 of the Ordinance to report the findings, opinions and recommendations on completion of a full investigation. In the case of such a report, the organisation concerned will be given the opportunity to comment for inclusion, where appropriate, in the final report. The report will be given to the head of the organisation for implementation. Where the head of the organisation disagrees with the findings or refuses to accept the recommendations, The Ombudsman may consider submitting the report to the Chief Executive.

2.12 The Ombudsman's Office is not a Court of Law and, unlike Court verdicts, The Ombudsman's recommendations are not binding. Yet, where an organisation fails to implement or to act adequately on any recommendation, The Ombudsman may report to the Chief Executive. Section 16(6) of the Ordinance requires that, within one month of such a report being submitted, or such longer period as the Chief Executive may determine, a copy of the report shall be laid before the Legislative Council.

Restrictions on Jurisdiction

2.13 The Ombudsman's purview is not all pervasive. Section 8, read with Schedule 2 to the Ordinance, specifies actions not subject to The Ombudsman's investigation, i.e. actions outside her jurisdiction.

Authority and Restrictions

Fig. 2.3

Examples of Actions not Subject to Investigation – Schedule 2 to the Ordinance

- Actions in relation to security, defence or international relations
- Legal proceedings or prosecution decisions
- Exercise of power to pardon criminals
- Contractual or commercial transactions
- Personnel matters
- Grant of honours, awards or privileges by Government
- Actions by the Chief Executive personally
- Imposition or variation of conditions of land grant
- Actions in relation to Hong Kong Codes on Takeovers and Mergers and Share Repurchases
- Crime prevention and investigation actions by Hong Kong Police Force or Independent Commission Against Corruption

2.14 Government policies and professional judgments are outside The Ombudsman's jurisdiction as they are not administrative actions *per se*, even though they may be the basis from which complaints of maladministration emanate. These are often subjects of complaints received. The Ombudsman would scrutinise these scrupulously to see if there are administrative aspects which come within her jurisdiction.

2.15 Section 10(1) of the Ordinance prescribes restrictions where The Ombudsman shall not conduct an investigation.

Fig. 2.4

Major Restrictions on Investigation of Complaint – section 10 (1) of the Ordinance

- Complainant having knowledge of subject of complaint for more than two years
- Complaint made anonymously
- Complainant not identified or traced
- Complaint not made by person aggrieved or suitable representative
- Subject of complaint and complainant having no connection with Hong Kong
- Statutory right of appeal or remedy by way of legal proceedings (except judicial review) available to complainant

2.16 Under section 10(2) of the Ordinance, The Ombudsman may decide not to investigate a complaint under certain circumstances.

Fig. 2.5

Circumstances where The Ombudsman may Decide not to Investigate – section 10 (2) of the Ordinance

- Investigation of similar complaints before revealed no maladministration
- Subject matter of complaint is trivial
- Complaint is frivolous or vexatious or is not made in good faith
- Investigation is, for any other reason, unnecessary

Authority and Restrictions

2.17 Where The Ombudsman decides not to conduct or to discontinue an investigation, she must inform the complainant of her decision with the reasons. My Office critically examines all in-coming complaints to establish whether they come within my statutory purview. If not, we promptly explain why we cannot or do not pursue the complaint. Where possible, we still try to help by pointing out the appropriate avenues for redress.

2.18 It is at times not easy to demarcate the boundaries prescribed in Schedule 2 to the Ordinance. I take a liberal approach and “screen in” all points administrative in nature for scrutiny and inquiry where due. My aim is to take every opportunity to identify areas for improvement in public administration.

2.19 Some of the restrictions prescribed by section 10(1) of the Ordinance are discretionary. I exercise discretion with caution and in accordance with the provisions of the law in deciding whether or not to conduct, or to discontinue, an investigation.

Secrecy Requirement

2.20 The law requires that all members of my Office and I, as well as my advisers, abide by a secrecy code. We must keep the strictest confidentiality on all matters that come to our knowledge in the exercise and execution of our functions. Breach of this code is a criminal offence, which carries a maximum penalty of a fine of $50,000 and imprisonment for two years.

2.21 From time to time, Legislative Councillors and civic leaders, members of the public and the media refer complaints to me with the expectation that they would be informed of the progress of processing. We sincerely appreciate their support and warmly welcome their referral. However, we are duty-bound by law not to discuss with, or to disclose to, third parties the processing or the outcome of any case. Except for official publication of an investigation report in anonymised form, we cannot and will not respond to any enquiry on individual complaints other than from the parties concerned. Here, I take the opportunity to thank all who have referred cases to my Office for their understanding of and respect for our secrecy code.

2.22 Before initiating inquiries, we always seek the complainants’ consent to obtain their personal data from the organisations concerned and to reproduce their documents to relevant organisations for processing their cases. This safeguards the privacy of their personal data. Where a complainant does not give consent, we will not be able to pursue a case.

2.23 The secrecy code is the cornerstone of the ombudsman system. It is strictly observed by all of us in discharging our duties. The aim is to ensure any person or organisation providing information to our Office can do so without reserve and without fear of possible consequences from the disclosure of their identity or related data.

2.24 During the year, a request by a complainant to access documents we collected in our investigation triggered off a discussion between this Office and the Office of the Privacy Commissioner for Personal Data on how our secrecy code and the principles of personal data protection can be complied with

simultaneously. This challenge is discussed in detail in **Chapter 5**.

The Ombudsman's Discretion

2.25 The Ordinance gives The Ombudsman discretion to undertake or not, continue or discontinue an investigation. Exercise of this discretion enables me to maximise the use of resources and hence our services to the community.

2.26 In view of my statutory independence, my decision on a case is final. Anyone not satisfied with my decision may request my Office to review a case or apply to the Court for judicial review.